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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 999

WILLIAM LEIGHTON,
Petitioner,

v.

THE ONE WILLIAM STREET FUND, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CERTAIN RESPONDENTS IN OPPOSITION

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The Opinions Below

The opinions of the United States District Court for the Southern District of New York are not reported and no opinions were rendered by the Court of Appeals for the Second Circuit.

Jurisdiction

The order of the Court of Appeals dismissing petitioner's appeals from the order of the District Court was entered on January 10, 1963. The petition for a writ of certiorari was filed on April 8, 1963. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1) and F.R.C.P. 23(b).

The Question Presented

Although petitioner asserts several purported questions, we believe the sole question presented is as follows:

1. Did the Court of Appeals properly dismiss petitioner's appeal from (a) an order of the District Court denying re-argument of his motion to intervene; and (b) an order and judgment of the District Court dismissing the action below?

Statement of the Case

This action below entitled *Rosenfeld* v. *Richardson* (hereinafter sometimes "the Federal *Rosenfeld* action") is one of seven suits instituted by stockholders of The One William Street Fund, Inc. (hereinafter "Fund") derivatively on behalf of the Fund against directors of the Fund and other defendants. The complaint in the action below, as amended, alleges acts of corporate waste and mismanagement and, more specifically, alleges that the investment advisory fee charged by defendant Lehman Bros. was excessive during the period of the alleged wrongs.

The Federal *Rosenfeld* action and its six companion actions, three in the United States District Court and three in the Supreme Court of the State of New York, were commenced in or about May, 1960, and aside from minor variations in form, all of the complaints were identical.

The Federal court actions, including the Federal *Rosenfeld* action, alleged that jurisdiction over the subject matter was founded upon the Investment Company Act of 1940.

In March, 1962 a motion was made to confirm and approve a settlement in the companion State Court action entitled *Rosenfeld* v. *Richardson* (hereinafter sometimes "the State *Rosenfeld* action").

On April 9, 1962, pursuant to notice to all stockholders of record of the Fund, a hearing was held by the New York Supreme Court to determine whether the proposed settlement was fair and reasonable. Three stockholders, owning an aggregate of 307 shares in the Fund, out of some 21,000,000 shares then outstanding, appeared at the hearing in opposition to the proposed settlement. Petitioner, who was not a stockholder at the time of the hearing, was not among the objectors.

On May 31, 1962, an opinion approving the proposed settlement "as fair and reasonable and beneficial to the Fund" (Pet. App. 19-21) was rendered in the State Court, and on June 20, 1962, an order and judgment approving the settlement and dismissing the action with prejudice was entered. Shortly after the entry of judgment in the State *Rosenfeld* action all the companion actions save the Federal *Rosenfeld* action were dismissed.

On May 17, 1962, petitioner became a stockholder of the Fund and promptly moved to intervene in the Federal *Rosenfeld* action. Intervention was sought on the ground of inadequate representation and also to raise issues involving alleged violations of Section 16(b) of the Securities Exchange Act of 1934, issues completely alien to those raised by the amended complaint in the action in which petitioner sought to intervene.

The motion to intervene was denied by order dated September 18, 1962, because the Court found that petitioner was not a stockholder at the time of the alleged wrongs (Rule 23(b) F.R.C.P.), was adequately represented, and sought to raise issues which would require the adjudication of an entirely different type of case than that which was before the Court.

Petitioner then moved to reargue the motion to intervene. While that motion was pending, defendants moved to dismiss the action below on the ground that judgment in the State *Rosenfeld* action was *res judicata* with respect to the issues raised in the amended complaint in the Federal action. The action was dismissed by an order and judgment dated October 3, 1962. Thereafter, on October 30, 1962 petitioner's motion for reargument was denied.

Petitioner then moved to the Court of Appeals, seeking review both of the order denying reargument of his motion to intervene and, although he was not a party to the action, the order and judgment of the District Court dismissing the action. Respondents moved to dismiss the appeal as untimely and frivolous, and on January 10, 1963 the Court of Appeals granted the motion and dismissed the appeal.

On January 24, 1963, petitioner moved the Court of Appeals *en banc* to vacate its order of dismissal. In addition to various unintelligible arguments made by petitioner, the primary ground advanced was that one of the members of the Court which dismissed the appeal had, while sitting as a District Judge, "So Ordered" a stipulation withdrawing a motion made by defendants to dismiss the original complaint, and thus was disqualified from hearing the motion to dismiss the appeal. At the same time petitioner moved for an injunction *pendente lite* of the stockholders' meeting of the Fund scheduled for March, 1963. Both motions were denied.

On March 9, 1963 petitioner applied to this Court for an order staying the judgments of the Court of Appeals and the District Court and for other relief. That application was denied by Mr. Justice Harlan on March 18, 1963. The petition for a writ of certiorari followed.

Argument

I.

There Is No Important Question of Federal Law

Petitioner's original application for intervention was based on a proposed complaint which alleged violations of Section 16(b) of the Securities Exchange Act of 1934. His application was denied on the ground, among others, that the allegations of the proposed complaint in intervention were not relevant to the amended complaint in this action.

The Section 16(b) claim is nowhere mentioned in the petition for a writ of certiorari. Petitioner now seeks review of the order and judgment, which dismissed this action on the ground of *res judicata*, for the sole purpose of vacating that judgment and substituting a judgment of dismissal on the ground of lack of jurisdiction over the subject matter.

Except for his avowed goal of receiving compensation for the "benefits" purportedly conferred upon the Fund* we do not understand what petitioner, who is not a lawyer, seeks to accomplish by his proposed intervention in this action. If, as petitioner asserts, his purpose is to effect a dismissal of the action, then the short answer is that the action already has been dismissed. Moreover, petitioner is not a party to this action, and under the circumstances of this case, whether the dismissal should be on the ground of lack of jurisdiction rather than *res judicata* hardly presents a question which should justify the issuance of a writ of certiorari.

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* At the time of the appeal, petitioner calculated the reasonable value of his "services" at something in excess of $12,000.

II.

The Decision Below Is Clearly Correct

A reading of the "Statement of the Case" herein leads to the necessary conclusion that petitioner's application to intervene was properly denied and his appeal from that denial was properly dismissed. Furthermore, petitioner's argument that the Court of Appeals lacked power to dismiss his appeal is clearly without merit.

> *A/S Kredit Pank* v. *Chase Manhattan Bank*, 303 F. 2d 648 (C.A. 2 1962);
> *John* v. *Gibson*, 270 F. 2d 36 (C.A. 9 1959);
> *Jimenez* v. *Barber*, 252 F. 2d 550 (9th Cir. 1958); see also *Eichler* v. *U. S. Fidelity & Co.*, 245 U. S. 102 (1917).

Lastly, petitioner's allegations of fraud and discrimination are at best gratuitous calumny and unworthy of extended answer.

There is no compelling reason for this Court to review a feigned issue raised by a person not a party to the action. The petition for a writ of certiorari contains no genuine question for consideration by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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